IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34596

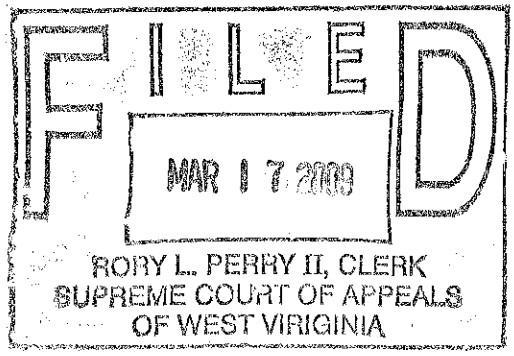
ENTERPRISE RENT A CAR OF KENTUCKY, and
EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Appellants,

v.

WANG-YU LIN,

Appellee.



On Appeal from the Circuit Court of Kanawha County

Circuit Court Appeal No. 06-C-2372

APPELLEE BRIEF OF WANG-YU LIN

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I. ISSUES PRESENTED

1. Does the West Virginia omnibus statute, *W.Va. Code* § 33-6-31, apply to an insurance policy obtained through a car rental agency, so as to require coverage for personal injury to the renter of the vehicle when the renter has given permission to another individual to drive the vehicle and that individual causes an accident?

2. Is an insured exclusion valid when the insured was not provided with a copy of the insurance policy or a summary of the coverage so as to make any exclusion conspicuous, plain and clear, or when the exclusion does not specifically name the insured?

II. NATURE OF PROCEEDINGS AND RULING OF THE LOWER COURT

This action was brought by the Appellee, Wang-Yu Lin, ("Jason Lin") against the Appellants, Enterprise Rent A Car of Kentucky ("Enterprise"), Empire Fire and Marine Insurance Company ("Empire")and Shin-Yi Lin, the driver of the vehicle, to recover damages for injuries Jason Lin sustained in an automobile accident.

The Appellants, Enterprise and Empire, denied the Appellee's claim for coverage under the purchased policy based on the fact that Shin Yi Lin, was not listed as an additional driver on the rental contract. The Appellee countered that coverage should be provided under the West Virginia omnibus statute which mandates that individuals are covered under the terms of an insurance policy when they are permissive users of the vehicle. The Appellants also denied the Appellee's claim based on the fact that he was making a claim on a policy of insurance which he purchased.

On January 31, 2008, the Appellee filed his motion for summary judgment with

the Lower Court requesting the Court determine that the Empire insurance policy provided coverage to Jason Lin. On February 25, 2008, the Appellants filed their cross motion for summary judgment requesting that the Court determine that the policy did not provide coverage to Mr. Lin. On March 6, 2008, the Lower Court held a hearing and heard oral arguments on behalf of and in response to the motions for summary judgment.

On March 19, 2008, the Honorable Jennifer Bailey entered an Order granting the Appellee's motion for summary judgment and decreeing that insurance coverage should be provided to Shin-Yi Lin, as she would constitute an insured under the policy issued by Empire, in order to cover the injuries sustained by the Appellee. See Order attached as Exhibit 1. In her Order, Judge Bailey recognized that coverage under the omnibus statute is mandatory, and that the Legislature has demonstrated a clear intent to afford coverage to any person using a motor vehicle with the owner's permission as a means of giving greater protection to those who are involved in automobile accidents. She also recognized that there was no dispute that Shin-Yi Lin was a permissive user of the vehicle, and that this Court had adopted the "initial permission rule". Lastly, Judge Bailey concluded that it was uncontroverted that the Appellee, Jason Lin, constituted an insured and a custodian, and as either, he could grant permission to another driver so as to fall within the parameters of the omnibus statute.

Judge Bailey rejected the Appellants' argument that coverage should be denied based on an insured exclusion, and concluded that neither the insurance policy or a summary of coverage was ever provided to the Appellee so as to make any exclusion conspicuous, plain and clear; thus, the exclusion was never brought to the attention of the insured. Additionally, any such exclusion does not specifically name Jason Lin on the declaration page or any where in the

policy and fails for these reasons as well.

III. STATEMENT OF THE FACTS

The Appellee, Jason Lin, was a student at Salem International University during August, 2006. On August 18, 2006, he and several other students leased a vehicle from the Enterprise facility in Clarksburg, West Virginia. Affidavit of Mr. Lin attached as Exhibit 2. One of the students who accompanied Mr. Lin on that day was Shin-Yi Lin. Ex. 2. Since the group was unfamiliar with West Virginia, they decided to go on a sight-seeing trip. None of the students owned a car, so one was rented from Enterprise.

The students were heading to Blackwater Falls State Park near Davis, West Virginia. There were no restrictions on the use of the vehicle in West Virginia. Jason Lin became tired and permitted Shin-Yi Lin to drive. Ex. 2. Ms. Lin possessed a valid driver's license at the time of the accident as noted on the accident report. See Ex. 2. While driving, Ms. Lin lost control of the vehicle and a tragic accident occurred ejecting the Appellee from the vehicle where he sustained a severe head injury. The Appellee has incurred over $300,000.00 in medical expenses, and has now undergone an additional surgery. His cognitive skills have been severely diminished. It is doubtful whether Mr. Lin will ever be gainfully employed.

At the time of rental, Mr. Lin purchased a $1,000,000.00 liability insurance policy from the counter agent at Enterprise. The policy was issued by Empire. The counter agent, David Smyer, was not licensed to sell insurance policies by the West Virginia Insurance Commissioner. Mr. Smyer testified that he was not given any type of training or instruction as to the protocol for the sale of insurance policies prior to the time of rental to Mr. Lin. Smyer depo. p. 9 attached as Exhibit 3. Moreover, Mr. Smyer had only been employed with Enterprise

two days before the transaction involving the Appellee. Ex. 3 at p. 8-9. Lastly, the only document provided to Mr. Lin at the time of rental was the rental contract itself, a copy of which is attached as Exhibit 4. Ex. 3 at p. 17. Mr. Smyer's supervisor, Jason Tardiff, testified that Mr. Lin was not provided a copy of the automobile liability policy upon which Empire is basing its denial. Tardiff depo p. 12-13 attached as Ex. 5. Accordingly, any exclusions were not made conspicuous, plain and clear.

Empire's 30(b)(7) corporate representative, John Kinsler, admitted that the rental contract is not a policy of insurance. Kinsler depo p. 5 Exhibit 6. Moreover, Enterprise is the named insured on the policy of insurance, and since Mr. Lin had the vehicle with the express permission of Enterprise, he would be a custodian of the vehicle.

IV. STANDARD OF REVIEW

The Supreme Court of Appeals exercises de novo review over a circuit court's decision to grant a motion for summary judgment. *Conrad v. ARA Szabo*, 198 W.Va. 362 (1996). A circuit court's Order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review; findings of fact, by necessity, include those facts that the court finds relevant and determinative of the issues and undisputed. *Poole v. Berkeley County Planning Comm'n*, 200 W.Va. 74 (1997).

As this Court is well aware, the construction and interpretation of an insurance policy, including whether it is ambiguous, is a question of law to be decided by the Court. *Riffe v. Home Finders Associates, Inc., et al.*, 205 W.Va. 216 (1999). Moreover, it is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured. *Syllabus point* 4, *National Mut. Ins. Co. v.*

McMahon and Sons, Inc., 177 W.Va. 734 (1987), *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216 (1999).

V. LEGAL ARGUMENT

A. THE WEST VIRGINIA OMNIBUS STATUTE, *W.VA. CODE* § 33-6-31, APPLIES TO THE EMPIRE FIRE AND MARINE INSURANCE COMPANY POLICY, AND REQUIRES COVERAGE FOR MR. LIN'S INJURIES.

The Circuit Court's Order granting summary judgment to the Appellee set forth sufficient factual findings and conclusions to substantiate that the West Virginia omnibus statute, *W.Va. Code* § 33-6-31, applies to the policy at issue in this case; therefore, insurance coverage should be provided to Shin-Yi Lin, as she would constitute an insured under the policy issued by Empire, in order to cover the injuries sustained by the Appellee.

1. The policy purchased by the Appellee was a motor vehicle liability policy.

The Appellants avoid the issue of whether the omnibus statute applies by asserting that the liability policy at issue is not a motor vehicle liability policy as defined in *W.Va. Code* §17D-4-12, which is the minimum financial responsibility statute setting forth the minimum amount of insurance coverage required under West Virginia law and mandating coverage to permissive users as well. Certainly, the liability policy issued by Empire is a "motor vehicle liability policy" as that was the purpose for which it was issued, and cannot reasonably be construed as covering any other risk. The fact that Enterprise claims that it self-insures for purposes of financial responsibility should not allow Empire to avoid the mandatory requirements of the omnibus statute. Moreover, it is a well settled principal of law that insurance policies are to be strictly construed against the insurer in this case, Empire, and in favor of the insured. *Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398 (1987).

The Appellants both claim that Enterprise, by virtue of self insuring up to the minimum limit as required by Chapter 17D, extinguishes Empire's responsibility under the omnibus statute. Jason Lin purchased the insurance policy issued by one of the Appellants, Empire. The insurance covered the automobile he rented. Enterprise has not established that the company qualified in this State to self insure so as to satisfy the requirements of Chapter 17D. See *W.Va. Code* §17D-6-2 (commissioner may issue a certificate of self insurance to those entities who qualify). Assuming that Enterprise had any motor vehicles physically present in this State more than 30 days during the past year, it would have to maintain such security. *W.Va. Code* §17D-2A-3. Security may be provided by one of the following methods, either through an insurance policy or qualifying as a self insurer under *W.Va. Code* §17D-6-2. Enterprise has many locations throughout West Virginia. It has provided no proof of compliance with the laws relating to compulsory insurance and financial responsibility as a self insurer. Enterprise now conveniently claims that it is self insured after Mr. Lin's accident has occurred.

The phrase self insurance means, generally, the assumption of one's own risk and, typically, involves the setting aside of a special fund to meet losses and pay valid claims, instead of insuring against such losses and claims through an insurance policy. *Syllabus point 1, Jackson v. Donahue*, 193 W.Va. 587 (1995). Since Enterprise has provided no such documentation, it can only be presumed that the policy issued by Empire would constitute the primary motor vehicle policy, and not a supplemental policy. In fact, the additional terms and conditions section of the contract provide the renter with minimum financial limits in the state where the vehicle is operated, but if the renter purchases the Empire policy, the Appellants turn around and credit Enterprise's purported self insured limit against the $1,000,000.00 liability policy. Accordingly,

Enterprise is not truly self insuring its vehicle for minimum financial responsibility purposes. Moreover, this Court in *Jackson* stated that qualifying as a self insurer does not allow an entity to circumvent the West Virginia motor vehicle omnibus statute, *W.Va. Code* §33-6-31(a) and *W.Va. Code* §17D-4-12(b)(2). *Jackson* at *Syllabus point 2.*

Moreover, there is nothing in the rental contract itself which specifically states that Enterprise has qualified as a self insurer as required under the financial responsibility statute. The rental contract is just that, an agreement to rent a vehicle to a person, in this case, Jason Lin, for a specific amount each day. The insurance purchased by Mr. Lin while incidental to the rental of the vehicle, should not alter Empire's responsibility under the omnibus statute. While there were no additional authorized drivers listed on the rental contract, the contract does take into consideration instances where other drivers may be covered as required by law. David Smyer, the counter agent who sold the policy, testified that the term "as except as required by law" may mean that if a person such as Mr. Lin was incapacitated for reason, he would be able to let someone drive the Enterprise vehicle. Mr. Lin became tried and acted responsibly, he let a companion drive. Based on these facts, coverage should be granted.

2. The Appellants have waived any argument relating to automobile rental coverage under *W.Va. Code* §33-12-32 being a clear departure from the scope of the omnibus statute.

In their Petition for Appeal, the Appellants have raised for the first time the issue of whether *W.Va. Code* §33-12-32, relating to automobile rental coverage, represents a clear departure from the scope of the omnibus statute in that it doesn't mandate uninsured and underinsured coverage, nor does it require coverage for any permissive user. This argument was not raised before the Circuit Court. In West Virginia, the general rule has long been that "when

nonjurisdictional questions have not been decided at the trial court level and are then raised before this Court, they will not be considered on appeal." *Whitlow v. Board of Education*, 190 W.Va. 225, 226 (1993). The rationale for this rule is that the issue "will not have been developed in such a way so that a disposition can be made on appeal." *Id.* A further consideration is fairness, and the notion that it is "manifestly unfair for a party to raise new issues on appeal." *Id.* Finally, the *Whitlow* Court noted that "there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom." *Id.*

In addition, this Court has stated:

> although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.

Minshall v. Health Care & Retirement Corporation of America, 208 W.Va. 4 (2000). The *Minshall* Court elaborated on the issue with references to a history of prior cases that set forth this standard:

> *See Mayhew v. Mayhew*, 205 W.Va. 490, 506, 519 S.E.2d 188, 204 (1999) ("our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal.; *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 585, 490 S.E.2d 657, 672 (1997)("we frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court."); *Koffler v. City of Huntington,* 196 W.Va. 202, 206 n. 6, 469 S.E.2d 645, 649, n.6 (1996)("Because plaintiff's arguments . . ., and the City's response thereto, were neither raised, argued nor considered by the circuit court on summary judgment, the subject of this appeal, they are not reviewable by this Court."); *State v. Miller*, 197 W.Va. 588, 597, 476 S.E.2d 535, 544 (1996)("Indeed, if any principle is settled in

> this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal."); *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995)("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."); *Whitlow v. Board of Educ. of Kanawha County*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993)("When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.").

Id. at 9-10, 323-324.

Thus, this Court should not consider the Appellants' argument pertaining to the applicability of *W. Va. Code* §33-12-32 as such argument was not raised before the Circuit Court.

However, should this Court review this issue, nothing contained in that *Code* section invalidates or alters the omnibus statute's requirements or Mr. Lin's argument. Moreover, *W.Va. Code* §33-12-32(h)(4)(B) states that a rental company may provide coverage, as applicable, to renters and other authorized drivers of rental vehicles for liability arising from the operation of a rental vehicle. Certainly, that *Code* section does not prohibit an insurer from being bound by the terms and conditions of the omnibus statute, nor does it limit coverage which may be given by an insurance carrier, or state that such coverage is excess or supplemental.

As Jason Lin argued to the Circuit Court, the individual who rented the vehicle to him was not qualified to sell insurance under this *Code* section. The purpose of *W.Va. Code* §33-12-32 is to authorize the "Insurance Commissioner to issue a limited license for the sale of automobile rental coverage", it does not dictate the terms and conditions of such policy or authorize an insurer to circumvent the omnibus statute or any other substantive aspect of the insurance policy itself. See *W.Va. Code* §33-12-32(a).

3. Pursuant to the omnibus statute, the Appellee, Wang-Yu Lin, was an insured/named insured and capable of granting permission to drive the vehicle to Shin-Yi Lin.

In West Virginia, every policy of insurance is subject to the omnibus clause contained in *W.Va. Code* §33-6-31. This omnibus clause provides that no policy or contract of bodily injury liability insurance arising from the ownership, maintenance or use of a motor vehicle shall be issued unless it shall contain a provision insuring the named insured and any other person, except a bailee for hire and a person specifically excluded by restrictive endorsement attached to the policy, for the use of or using the motor vehicle with the consent, express or implied, of the named insured for bodily injury sustained or loss or damage occasioned within the coverage of the policy as a result of negligence in the operation or use of the vehicle. *W.Va. Code* §33-6-31(a). In addition, the statute specifically includes custodians of the motor vehicle and their permissive users as being covered under the omnibus statute.

Despite the fact that Mr. Lin did not list additional drivers on the rental contract, coverage should be provided. The mandatory omnibus requirement imposed by *W.Va. Code* §33-6-31(a) indicates that the Legislature has demonstrated a clear intent to afford coverage to anyone using a vehicle with the owner's permission as a means of giving greater protection to those who are involved in automobile accidents. *Syllabus point 3*, in part, *Burr v. Nationwide*, 178 W.Va. 398 (1987). The purpose of the law is quite simple. It protects those injured in automobile accidents when a person lends his/her vehicle. It is no different than if someone lends their car to a friend and the person causes an accident. In such a case, there would be coverage. Jason Lin's situation is no different.

In *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606 (1991), the West

Virginia Supreme Court adopted the "initial permission rule" on the grounds that the mandatory omnibus requirement imposed by the statute governing all automobile policies indicated that the West Virginia Legislature intended to provide coverage to those injured in automobile accidents. In that case, Carl Taylor entered the premises of a car dealership for the purpose of purchasing an automobile. He requested permission from the sales person to take the vehicle to the residence of a friend to ask if she approved of the vehicle prior to his purchase of it. The salesperson gave Mr. Taylor permission to take the car at approximately 12:20 p.m., but informed Mr. Taylor that it had to be returned no later than 1:00 p.m. that day.

When Mr. Taylor failed to return the vehicle to the dealership at the appointed hour, the salesperson notified the West Virginia State Police that Mr. Taylor had stolen the vehicle. Sixteen days after Mr. Taylor had initially driven away from the car dealership, he was involved in an automobile accident while driving the vehicle he took from the dealership. The automobile accident resulted in the death of another man.

At the time Mr. Taylor stole the vehicle from the car dealership, the company was insured by a policy issued by Universal. The insurance company filed a declaratory judgment action to resolve whether it owed coverage to Mr. Taylor under the policy. The Circuit Court entered an order in favor of Universal, finding that the insurance policy issued to the dealership did not provide coverage to an individual such as Mr. Taylor who stole a vehicle from its insured. On appeal, the West Virginia Supreme Court reversed the Circuit Court's decision and adopted the "initial permission rule". The initial permission rule provides:

> The bailee need only have received permission in the first instance, and any use while it remains in his possession is with the

> permission though that use is for a purpose not contemplated by the bailor when he parted possession with the vehicle. In other words, if the original taking was with the insured's consent, every act subsequent thereto while the bailee is driving the car is held to be with the insured's permission in order to permit a recovery under the omnibus clause. Under this rule, a deviation from the permitted use is immaterial. The only essential thing being that permission be given for use in the first instance.

Id., quoting 7 Am. Jur.2d Automobile Insurance §248 (1980) (recognizes liberalizing purpose of omnibus clause protecting any person injured . . by giving him a cause of action against the insurer for injuries deemed to have been caused by the operation of the car).

Jason Lin constitutes an insured and, presumably, the named insured under the terms of the Empire policy. An insured is defined as the individual who rents the vehicle from Enterprise. Black's Law Dictionary defines "named insured" as the person specifically designated in the policy as the one protected and, commonly, it is the person with whom the contract of insurance has been made. *Black's Law Dictionary* 5th Edition. Moreover, it is uncontroverted that Mr. Lin gave permission to Shin-Yi Lin to drive the vehicle due to the fact that he was fatigued. Accordingly, it was a permissive use and coverage would extend under our omnibus statute.

In *State Farm Mutual Automobile Insurance Company v. Budget Rent-A-Car Systems, Inc., et al.*, 359 N.W.2d 673 (1984), the Court of Appeals of Minnesota examined a situation analogous to the case at hand. In that case, a man named Bollinger rented a car from Budget. Mr. Bollinger did not identify any additional drivers on the application form. After drinking at a party, a man named Clark drove the rental vehicle with Mr. Bollinger's permission, and struck a tunnel. Mr. Bollinger and his wife were guest passengers along with Mr. Clark's

wife.

State Farm, the insurer of the Clark's personal vehicle, sought a declaratory judgment action seeking judicial determination of the rights and liabilities of various insurance companies connected with a rental car accident. Budget was the owner of the vehicle and was self-insured for the first $100,000.00 of coverage. After that amount, Arganon, the insurer for Budget, was responsible for the next $900,000.00 in coverage. It was State Farm's contention that its policy was excess above the $1,000,000.00 of coverage available from Budget & Arganon.

The rental agreement specifically provided that Budget and its insurer would not afford liability coverage to a driver not listed on the agreement. Therefore, the insurer claimed there could be no permissive use. The Court extended coverage to the injured passenger and stated when permission to use the vehicle is initially given, subsequent use short of actual conversion or theft remains permissive within the meaning of the omnibus clause, even if such use was not within the contemplation of the parties or was outside any limitations based on the initial grant of permission. *Milbank Mutual Ins. Co. v. United States Fidelity & Guaranty Co.*, 332 N.W. 160, 162 (Minn. 1983); *State Farm Mutual Automobile Insurance Co. v. Budget Rental Car Systems, Inc., et al.*, 359 N.W.2d 673, 676 (Minn. 1983). Accordingly, although Budget and its insurer denied coverage to Mr. Clark, as an unlisted additional driver, he was none the less an insured under the initial permission rule, and coverage was provided. *Id.* at 676. See, *Continental Ins. Co. v. Body,* 577 F.Supp. 1139 (1983) (liability coverage where the rented vehicle is used for a permitted purpose even though the insured did not expressly authorize the driver to use the rental vehicle).

The Appellants cite *Avis Rent-A-Car Sys. v. Chor Vang*, 123 F.Supp.2d 504 (2000) as support for their argument. In that case, the vehicle at issue was driven outside of the State of Minnesota, when the Minnesota statute relied upon did not apply to accidents occurring outside of Minnesota. *Id.* at 506. Furthermore, the driver of the vehicle was under 25 years of age and, as a result, could not have even qualified as an additional authorized driver according to the terms of a brochure given to the renter at the time of the accident. This is not the situation in Mr. Lin's case as there was no prohibition to Shin-Yi Lin driving the vehicle and location of the accident is not an issue.

The Appellants cite *W.Va. Code* §33-12-32 as authority for their denial of coverage. However, as previously mentioned, that provision merely allows rental car companies to obtain limited licenses for the sale of rental coverage, and allows counter agents to forego the licensing requirements that a personal lines agent would have to fulfil in order to sell insurance. However, the Commissioner must still issue a limited license to the employee of the rental company. *W.Va. Code* §33-12-32(c). Also, the fact that the policy forms were filed with the Insurance Commissioner under *W.Va. Code* §33-6-8 means just that, and the form is approved automatically after 60 days, not the policy language in the form. The filing of a particular policy form does not deem legal and binding policy language as the "determination of proper coverage of an insurance contract where the facts are not in dispute is a question of law." *Syllabus point 1*, *Tennant v. Smallwood*, 211 W.Va. 703 (2007). Moreover, the judiciary is the final authority on issues of statutory construction, and the Court is obligated to reject administrative construction contrary to the clear language of a statute. *Lovas v. Consolidation Coal Company, Sup. Ct. W.Va. No.* 33670.

In their brief, the Appellants rely on cases from other jurisdictions; however, each of these cases can be clearly distinguished from the case at hand. In *Craster v. Thrifty Rent-A-Car System, Inc.*, 187 S.W.3d 33 (Tenn. 2005), the Court of Appeals of Tennessee affirmed a trial court's granting of summary judgment to the defendant as the defendant was not a proper party and the insurance policy did not cover the plaintiff's damages. In this case, there was testimony from the rental agent that he had between 8 to 10 years of experience in handling rental transactions. *Id.* at 37. The rental agent testified in detail about his description to the plaintiff of available insurance coverage, including personal injury coverage, and that the plaintiff declined. *Id.* The Tennessee Court further noted that the rental agent gave the plaintiff a rental jacket that explained that there were exclusions summarized on a brochure which was available at the rental counter. Upon reading the opinion, it appears that no argument was asserted regarding whether an omnibus clause would require coverage to be found. Rather, the opinion involved the issue of what coverage the plaintiff thought she had purchased and whether or not there was any fraud committed.

In the case at hand, the rental agent had been on the job a matter of days, and contrary to West Virginia statute, was not licensed and had received no training regarding the sale of the policies, and merely provided Mr. Lin with a copy of the rental contract. There was no summary brochure or insurance policy given to Mr. Lin. Moreover, West Virginia has an omnibus statute which would specifically extend coverage to Mr. Lin. It is unclear from the opinion whether Tennessee has an omnibus statute, and if so, whether the intent and language of that statute is comparable to the intent and language of the West Virginia statute.

In *Arredondo v. Avis Rent-A-Car System, Inc.*, 24 P.3d 928 (2001), the Supreme

Court of Utah upheld summary judgment excluding coverage for damages arising from personal injury of a plaintiff who was struck by a rental car. The rental car was being driven by the named renter's 17 year old son at the time of the accident. The rental agreement excluded coverage for drivers that were under 25 years old. The issue for the Utah Supreme Court was whether the excess coverage purchased by the renter had to comply with a provision in the Utah *Code* known as the Financial Responsibility of Motor Vehicle Owners and Operators Act. *Id.* at 932. The Utah Supreme Court concluded that the excess policy was not purchased to satisfy the Utah Financial Responsibility Act; therefore, the coverage of the policy was governed by its own terms and excluded coverage for the 17 year old son. The Utah Financial Responsibility *Code* section cited in the opinion does not contain similar language to the West Virginia omnibus statute.

In *Philadelphia Indemnity Insurance Company v. Carco Rentals, Inc, et al,* 923 F.Supp. 1143 (U.S.D.C. W.D. Ark.1996), the United States District Court for the Western District of Arkansas granted summary judgment to the defendants and found that the supplemental liability insurance policy did not provide coverage for a fatal accident. The key issue in this case was whether the policy exclusion for driving while intoxicated was valid or contrary to public policy. The Court determined that the exclusion did not violate public policy because the exclusion had the affect of punishing anti-social conduct. The Court's decision did not rely on an omnibus statute such as the one at issue in this case.

In *Lonesathirath v. Avis Rent A Car System, Inc., et al.,* 937 F.Supp. 367 (U.S.D.C. E.D. Penn. 1995), the United States District Court for the Eastern District of Pennsylvania addressed the issue of whether a rental company, who was self insured, failed to include a waiver provision regarding uninsured coverage, contrary to the Pennsylvania Motor

Vehicle Financial Responsibility Law. The Court determined that the excess policy offered by Avis was not subject to the Financial Responsibility statute. The Court's decision did not rely on a general omnibus statute such as the one at issue in this case.

As explained in detail above, the out of jurisdiction cases relied on by the Appellants are not factually or legally similar to the instant case; therefore, this Court should not rely on the findings of such cases. Rather, this Court should adopt the rationale and findings of the Honorable Judge Bailey and those of the Court of Appeals of Minnesota and other cases cited by the Appellee. Clearly Jason Lin was an insured under the policy, and thus, capable of giving Shin-Yi Lin permissive use of the vehicle pursuant to West Virginia's omnibus statute.

4. In the Alternative, pursuant to the omnibus statute, the Appellee, Wang-Yu Lin, was a custodian of the vehicle and capable of granting permission to drive the vehicle to Shin-Yi Lin.

Another basis for coverage is that Mr. Lin would be considered a custodian of the vehicle which also falls within the parameters of the omnibus statute. *W.Va. Code* §33-6-31(a) dictates that not only the owner of the vehicle, but its custodian can provide the requisite permission to invoke coverage under the liability section of an automobile policy. *Metropolitan Property & Liab. Ins. Co. v. Acord*, 195 W.Va. 444 (1995). Specifically, that *Code* section provides, that if coverage resulting from the use of a non-owned vehicle is conditioned upon the consent of the owner of such motor vehicle, the word owner shall be construed to include the custodian of such motor vehicle. *Id.* at 451.

Clearly, Enterprise owns the motor vehicle. In order to be a custodian as contemplated by the omnibus statute, a person must be entrusted, either expressly or impliedly, by the named insured or his spouse with possession of the motor vehicle. *Id. at Syllabus point 3.*

Under *W.Va. Code* §33-6-31(c), the term "named insured" shall mean the person named as such in the declaration of the policy or contract and shall also include such person's spouse, if resident of the same household, and the term "insured" shall mean "named insured" . . . *W.Va. Code* §33-6-31(c). The terms "named insured" and "insured" are used synonymously in the omnibus statute. Additionally, while Mr. Lin's name was not specifically listed on the declaration page, there is a reference to endorsement, EMO808NI, on the declaration page of the policy as identifying the named insured. Based on the wording of *W.Va. Code* §33-6-31(c), Enterprise would be a named insured, since the company is included on the EMO808NI endorsement referenced on the declarations page. Empire's 30(b)(7) corporate representative, John Kinsler, testified that Enterprise Rent A Car of Kentucky was listed on the declaration page of the Empire insurance policy. Kinsler depo p. 12-13. *W.Va. Code* §33-6-31 states that the individual or corporation on the declaration page constitutes a named insured under the policy. *Id.*

Clearly, Enterprise expressly entrusted the vehicle to Mr. Lin, which would define him as a custodian under the statute, and any person he let use the vehicle would be covered. Lastly, it is uncontroverted that Mr. Lin allowed Shin-Yi Lin to operate the vehicle with permission. Ex. 1. Accordingly, coverage should be provided and the granting of summary judgment was proper and should be upheld by this Court.

B. THE INSURED EXCLUSION IN THE EMPIRE POLICY IS NOT VALID AS THE INSURED/RENTER WAS NOT PROVIDED WITH A COPY OF THE INSURANCE POLICY OR A SUMMARY OF COVERAGE SO AS TO MAKE THE EXCLUSION CONSPICUOUS, PLAIN AND CLEAR.

An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing

them in such a fashion as to make their relationship obvious to other policy terms, and must bring such provisions to the attention of the insured. *Syllabus point 5, Bender v. Glendenning,* 219 W.Va. 174 (2006). Empire simply cannot claim that the provisions of the insurance policy were made conspicuous, plain and clear when its agent did not provide Mr. Lin with a policy or provide any explanation of its terms and conditions. Enterprise's counter agent, David Smyer, the person who rented the vehicle to Mr. Lin and sold him the policy of insurance, testified he was on the job only two days before he sold the insurance policy. Moreover, he was not licensed to sell this type of insurance. This is substantiated by Jason Tardiff, Mr. Smyer's supervisor and Enterprise's 30(b)(7) corporate representative.

Mr. Lin purchased the insurance because he did not own a vehicle himself and was uninsured. If a carrier intends to rely upon exclusions in the policy, it is only logical that the person who purchases the insurance policy should be given the actual policy, or a summary of coverage or at least an explanation of the coverage. Clearly, this was not done. Accordingly, any denial based upon any policy provisions should not be allowed under West Virginia law, as the terms and conditions of the policy including the exclusions were not made conspicuous, plain and clear to Mr. Lin.

The West Virginia cases which the Appellants rely upon, apply only to a named driver exclusion in an insurance policy. For example, in *Jones v. Motorist Mutual Ins. Co.*, 177 W.Va. 763 (1987), the West Virginia Supreme Court examined a named driver exclusion and held that such an exclusion was invalid up to the minimum limits of financial responsibility. However, in that case, Motorist Mutual complied with the provisions of *W.Va. Code* §33-6-31 by issuing a restrictive endorsement, attached to the policy, specifically excluding the insured's son

by name. *Id.* There was no specific restrictive endorsement attached to Empire's policy.

In a case directly on point, *Burr v. Nationwide Mut. Ins. Co.*, 178 W.Va. 398 (1987), the West Virginia Supreme Court examined to what extent coverage may be limited by restrictive endorsement to the policy under the omnibus statute. In *Burr*, the Court held that any insurance policy which attempts to contravene *W.Va. Code* §33-6-31(a) is of no effect. *Id.* Mr. Lin purchased a $1,000,000.00 liability policy covering the driver of the Enterprise motor vehicle. An accident occurred in which he was injured. The driver of the vehicle, Shin Yi Lin, was a permissive user of the vehicle so as to fall within the parameters of the omnibus statute. See, *Universal Underwriters Ins. Co. v. Taylor*, 185, W. Va. 606 (1991)(mandatory omnibus requirement imposed by statute as the West Virginia Legislature intended to provide coverage to those injured in automobile accidents). The other cases which the Appellants cite apply to intentional act exclusions and are not applicable here.

Enterprise also denied coverage by relying on an exclusion for bodily injury sustained by an insured, in this case, Jason Lin. As argued in detail above, none of the exclusions were ever made conspicuous, plain and clear to Mr. Lin. The rental agent selling the policy was new to the job and not licensed to sell insurance. In addition, the rental agent testified that he didn't recall what information about the policy he conveyed to Mr. Lin. Furthermore, Mr. Lin never received a copy of the insurance policy, and his name mentioned anywhere in the policy as being specifically excluded. See, *Dairyland v. East*, 188 W.Va. 581 (1992) (named insured exclusion, but must specifically list named insured on declarations page). Thus, the cases cited by the Appellants are not applicable here. As such, any exclusion would be invalid under West Virginia law.

Finally, coverage would be afforded to Mr. Lin as a insured guest passenger under the insurance policy. The protection extended to guest passengers is effectuated by construing an insurance policy as included in the statutory protection of *W.Va. Code* §33-6-29 or by voiding the policy provisions in conflict with the requirements of the statute. *Johnson v. Continental Casualty Co.*, 157 W.Va. 572 (1974). *W.Va. Code* §33-6-29 mandates coverage for injuries to guest passengers. *Id.* Therefore, any exclusion to the contrary is void. Other West Virginia cases have held such guest passenger prohibitions to the contrary to public policy. *Ball v. National Life*, 177 W.Va. 427 (1986); see also, *Coffindaffer v. Coffindaffer*, 161 W.Va. 557 (1978). Accordingly, any such exclusion is void under West Virginia law.

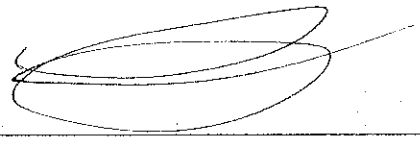
VI. CONCLUSION

The Circuit Court's Order properly set forth the relevant, uncontested issues of fact and findings of law supporting its decision to grant summary judgment to the Appellee in regard to the issue of finding that insurance coverage was available for the Appellee's serious and tragic injuries. The West Virginia omnibus statute, *W.Va. Code* § 33-6-31, clearly applies to an insurance policy obtained through a car rental agency, such as to require coverage for personal injury to the renter of the vehicle, as either an insured and/or a custodian, when the renter has given permission to another individual to drive the vehicle and that individual causes an accident. The insured exclusion is not valid when the insured/renter was not provided with a copy of the insurance policy or a summary of the coverage so as to make the exclusion conspicuous, plain and clear, and the exclusion does not specifically name the insured. For all the above mentioned reasons and for those reasons set forth in the Circuit Court of Kanawha County's Order granting

summary judgment, the Appellee respectfully requests this Court affirm Judge Bailey's Order.

WANG-YU LIN,

By Counsel



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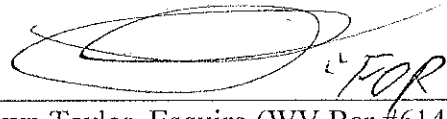

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 34596

WANG-YU LIN,

Plaintiff,

v.

CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 06-C-2372 (Judge Bailey)

SHIN YI LIN,
ENTERPRISE RENT A CAR OF KENTUCKY,
a Kentucky corporation, and
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
a Nebraska corporation,

Defendants.

CERTIFICATE OF SERVICE

We, William M. Tiano, Christina L. Smith and Shawn Taylor, counsel for Appellee/Plaintiff, do hereby certify that we have this 17th day of March, 2009, served the foregoing ***Appellee Brief of Wang-Yu Lin***, upon counsel of record by hand delivery addressed as follows:

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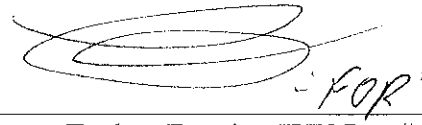

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EXHIBITS

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